STATE OF MICHIGAN

IN THE SUPREME COURT

EMPLOYERS MUTUAL CASUALTY COMPANY

Plaintiff/Counter-Defendant-Appellee,

v.

HELICON ASSOCIATES, INC., a Michigan corporation, ESTATE OF MICHAEL J. WITUCKI, in its capacity a successor in interest to Michael J. Witucki, a deceased individual,

Defendants/Counter-Plaintiffs,

and

DR. CHARLES DREW ACADEMY, a Michigan public school academy, JEREMY GILLIAM,

Defendants, and

WELLS FARGO ADVANTAGE NATIONAL TAX FREE FUND, a series of the Delaware business trust known as the Wells Fargo Funds Trust, Delaware Business Trust, WELLS FARGO ADVANTAGE MUNICIPAL BOND FUND (in part as successor to the Wells Fargo Advantage National Tax-Free Fund), a series of the Delaware business trust known as the Wells Fargo Funds Trust, a Delaware business trust, LORD, ABBETT MUNICIPAL INCOME FUND, INC., on behalf of its series Lord Abbett High Yield Municipal Bond Fund, a Maryland corporation, PIONEER MUNICIPAL HIGH INCOME ADVANTAGE, a Massachusetts business trust, by Pioneer Investment Management, Inc., its investment advisor,

Defendants-Appellants.
_____/

Supreme Court
No. 152994

Court of Appeals
No. 322215

Wayne County Circuit Court
Case No. 12-002767-CK

SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL BY DEFENDANT-APPELLANT

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IV. STATEMENT OF QUESTIONS PRESENTED

A. WHETHER THE CONSENT JUDGMENT AMOUNTS TO A JUDGMENT OR ADJUDICATION BASED ON A *DETERMINATION* OF THE INSURED'S CONDUCT.

Defendants-Appellants say: "No."

Plaintiff-Appellee says: "Yes."

The court of appeals said: "Yes."

The circuit court said: "Yes."

B. WHETHER THE CONSENT JUDGMENT WAS A DETERMINATION THAT ACTS OF FRAUD OR DISHONESTY WERE COMMITTED BY THE INSURED.

Defendants-Appellants say: "No."

Plaintiff-Appellee says: "Yes."

The court of appeals said: "Yes."

The circuit court said: "Yes."

V. ARGUMENT

In its Order dated July 1, 2016 (the "Order"), the Court directed the parties to provide supplemental briefing on the two questions presented in Section III above. The Defendant-Appellant Funds[1] addressed both issues in their Application for Leave to Appeal filed on January 11, 2016 ("Application" or "App.") and Reply in Support of Application for Leave to Appeal filed on March 2, 2016 ("Reply"). *See* App. at pp. 16-20 and Reply at pp. 4-7 (The Funds' Consent Judgment is not a factual determination, rendering it incapable of triggering the Fraud Exclusion); App. at pp. iii, 13-14, 24-27 and Reply at p. 8 (The Funds' negligence-based CUSA claims lack the element of scienter or intent necessary to trigger the Fraud Exclusion). The Funds provide limited additional briefing herein, but in the interest of brevity will simply direct the Court to the relevant portions of its initial briefing to the extent possible.

A. THE CONSENT JUDGMENT IS NOT A JUDGMENT OR ADJUDICATION BASED ON A *DETERMINATION* OF THE INSURED'S CONDUCT.

This Court and numerous Michigan Court of Appeals decisions have made clear that a consent judgment does not constitute an adjudication, or even a concession, of facts or allegations at issue. App. at pp. 16-20; Reply at pp. 4-7. Applying those controlling Michigan decisions to the facts of this case, it is clear that the Consent Judgment cannot constitute the factual "determination" necessary to trigger the operation of the Fraud Exclusion. *Id.;* see also *Acorn Inv Co v Michigan Basic Prop Ins Ass'n*, 495 Mich 338, 354; 852 NW2d 22, 30 (2014) ("The court does not determine … the rights and obligations of the parties in a consent judgment.") (internal quotations omitted). The Court's analysis may end here as this single defect is sufficient to require the reversal, via preemptory order or otherwise, of the Court of Appeals' Opinion.

[1] Capitalized terms used, but not separately defined herein will have the same meaning accorded to them in the Application.

Should the Court wish to inquire beyond the controlling Michigan authority set forth in the Funds' Application and Reply, policy considerations and the weight of authority from other jurisdictions further support reversal of the Opinion on the basis that the Consent Judgment is not a factual determination sufficient to trigger the Fraud Exclusion.

The issue of what, if anything, a consent judgment "determines" most frequently arises in cases dealing with the preclusive effect of consent judgments for purposes of issue preclusion and claim preclusion.[2] Issue preclusion, also known as collateral estoppel, prohibits parties from

[2] In this context it is critical to distinguish between the doctrines of issue preclusion (also known as collateral estoppel) and claim preclusion (also known as *res judicata*). While courts sometimes conflate the terms, the doctrines are very distinct. The key difference between the two doctrines is that issue preclusion (or collateral estoppel) requires that an issue of fact or law is actually decided and determined by a valid and final judgment, whereas claim preclusion (or *res judicata*) applies to claims that could have been litigated (regardless of whether they actually were). See, e.g., *Monat v State Farm Ins Co*, 469 Mich 679, 682; 677 NW2d 843, 845 (2004) (Collateral estoppel applies when a "question of fact essential to the judgment [has been] actually litigated and determined by a valid and final judgment."); *Hofmann v. Auto Club Ins Ass'n*, 211 Mich App 55, 92; 535 NW2d 529, 548 (1995) ("Unlike collateral estoppel, which bars relitigation of only those issues actually decided, res judicata bars relitigation of claims, and Michigan has adopted the broad application of res judicata, barring both those claims actually litigated and those claims arising out of the same transaction that could have been litigated, but were not.") (citations omitted). Applying this distinction here, the Consent Judgment—via the doctrine of **claim preclusion**—would preclude the Funds from commencing a new action seeking to relitigate Helicon and Witucki's liability arising out of the offering and sale of the Bonds (regardless of the theory of liability), because all such claims **could have** been litigated as part of the Underlying Suit. *Hofmann*, 211 Mich App at 92; see also *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 418; 733 NW2d 755, 759 (2007) (claim preclusion "bars not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not.") (citations omitted). But the Consent Judgment cannot serve as a factual determination that Helicon or Witucki engaged in fraudulent or dishonest conduct—sufficient to invoke the **issue preclusion** doctrine or trigger the Fraud Exclusion—because such issue was never "**actually litigated and determined**" in the Underlying Suit. *Monat*, 469 Mich at 682 (emphasis added); see also *Am Mut Liab Ins Co v Michigan Mut Liab Co*, 64 Mich App 315, 327; 235 NW2d 769, 776 (1975) ("a judgment can be given collateral estoppel effect only as to those issues which were actually and necessarily adjudicated . . . Nothing is adjudicated between two parties to a consent judgment."); see also *VanDeventer v Michigan Nat Bank*, 172 Mich App 456, 463; 432 NW2d 338, 341 (1988) ("Collateral estoppel conclusively bars only issues 'actually litigated' in the first action. A question has not been actually litigated until put into issue by the pleadings, submitted to the trier

relitigating issues that were actually adjudicated and determined in a valid final judgment. *Am Mut Liab Ins Co v Michigan Mut Liab Co*, 64 Mich App 315, 326; 235 NW2d 769, 776 (1975). Under Michigan law, consent judgments **do not** support issue preclusion because, in a consent judgment, nothing is actually adjudicated. *Id.* at 327 ("a judgment can be given collateral estoppel effect only as to those issues which were actually and necessarily adjudicated. . . Nothing is adjudicated between two parties to a consent judgment."). This refusal to accord a determinative effect to consent judgments is supported not just by the weight of authority, but also by public policy considerations:

> The social interest in reducing instances of costly litigation is undermined by a rule which provides drastic consequences for settlements. One will tend to avoid a settlement rather than be later bound in potentially far-reaching, and often unintended, ways by facts imbedded in an otherwise innocuous settlement agreement. Because the application of the doctrine of collateral estoppel to consent judgments will in many cases be unforeseeable, consent judgments may become less desirable, thus impeding and embarrassing the settlement process.

Id. at 327-328; see also *In re Fodale*, 2012 WL 718904, unpublished opinion of the US Bankruptcy Court for the Eastern District of Michigan, issued February 23, 2012 (Docket No 10–07510), at *3-4.

Fodale applied Michigan law and its underlying policy concerns to a factual situation analogous to the one at issue here. There, plaintiff sued defendant for fraud, among other things, in connection with defendant's failure to pay for construction services. *Fodale*, 2012 WL 718904, at *1. The parties entered into a consent judgment and defendant subsequently filed for chapter 7 bankruptcy. *Id.* at *2. Plaintiff sought a determination that the debt was

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of fact for a determination, and thereafter determined."). The distinction between the separate doctrines of issue preclusion and claim preclusion is critical here because it serves to distinguish any authority EMC may submit examining the preclusive effect of consent judgments under the doctrine of claim preclusion. For the reasons set forth above, any such authority is inapposite with respect to the key question before the Court—i.e., whether the Consent Judgment constitutes a "determination" sufficient to trigger the Fraud Exclusion.

nondischargeable on the grounds it was based on fraud, and argued the consent judgment should be granted preclusive effect on the issue of the defendant/debtor's alleged fraud. *Id.* The court rejected plaintiff's argument, holding the consent judgment was not preclusive of any issue—including fraud—because nothing was actually adjudicated in the consent judgment. *Id.* at *3-4. *Fodale*—and Michigan's general refusal to treat a consent judgment as a factual determination sufficient to support the application of collateral estoppel (aka issue preclusion)—is consistent with controlling authority in a majority of the jurisdictions across the country.[3]

[3] *Austin v Alabama Check Cashers Ass'n*, 936 So 2d 1014, 1041 (Ala 2005) ("The central feature of any consent decree is that it is not an adjudication on the merits; the decree may be scrutinized by the judge for fairness prior to his approval, but there is not a contest or decision on the merits of the issues underlying the lawsuit.") (internal citation omitted); *Cont'l Ins Co v Bayless & Roberts, Inc*, 608 P2d 281, 295 (Alaska 1980) (consent judgment not an adjudication on the merits); *Chaney Bldg Co v Tucson*, 148 Ariz 571, 573; 716 P2d 28, 30 (1986); *In re Gen Adjudication of All Rights to Use Water In Gila River Sys & Source*, 212 Ariz 64, 70 n 8; 127 P3d 882, 888 (2006) ("consent judgments ordinarily support claim preclusion but not issue preclusion. This is because issue preclusion (formerly referred to as collateral estoppel) attaches only when an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment. In the case of a judgment entered by confession, consent, or default, none of the issues is actually litigated.") (internal citations omitted); *Selig v Barnett*, 233 Ark 900, 906; 350 SW2d 176, 180 (1961) ("A consent judgment is not a judicial determination of any litigated right") (internal citations omitted); *Milicevich v Sacramento Med Ctr*, 155 Cal App 3d 997, 1004; 202 Cal Rptr 484 (1984); *Nichols v Bd of Cty Comm'rs of Cty of La Plata, Colo*, 506 F3d 962, 969 (CA 10, 2007) (applying Colorado law); *Owsiejko v Am Hardware Corp*, 137 Conn 185, 187–88; 75 A2d 404, 406 (1950) ("A consent judgment is a contract between the parties approved by the court, and its terms may not be extended beyond the agreement entered into. It is not an adjudication on the merits.") (internal citations omitted); *Giffing v Gwinn*, 277 A2d 693, 695 (Del Super 1971); *Tutt v Doby*, 459 F2d 1195, 1199 (DC Cir 1972) (citing *United States v International Building Co*, 345 US 502, 506; 73 S Ct 807; 97 L Ed 1182 (1953)); *Blakely v Couch*, 129 Ga App 625, 629; 200 SE2d 493, 497 (1973); *Arnett v Envtl Sci & Eng'g, Inc*, 275 Ill App 3d 938, 944; 212 Ill Dec 467, 471-72; 657 NE2d 668, 672–73 (1995) ("Sound logic dictates the distinction as to when consent judgments will be given preclusive effect. When a third party asserts collateral estoppel based upon a consent judgment, he is attempting to rely upon an administrative act of the court recording an agreement of the parties, rather than a judicial determination of the rights of the parties and the issues involved. Courts are therefore reluctant to give preclusive effect to consent judgments because the extent to which the issues were actually litigated and resolved is uncertain. On the other hand, parties to a consent judgment may assert the judgment for purposes of *res judicata* because this doctrine prohibits not only the relitigation of those issues actually raised in the first

Both Michigan law and the weight of authority from other jurisdictions are clear—the Consent Judgment is not a "determination" of any fact in issue in the Underlying Suit. As such, the Consent Judgment is insufficient to trigger the Fraud Exclusion in the EMC Policies. Accordingly, the Funds respectfully request this Court peremptorily reverse the Opinion or, in the alternative, grant the Funds' Application for Leave to Appeal.

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proceeding but also any issue which might have been raised.") (internal citations omitted); *Hoth v Iowa Mut Ins Co*, 577 NW2d 390, 392 (Iowa 1998); *Burgess v Consider H Willett, Inc*, 311 Ky 745, 749; 225 SW2d 315, 317 (1949) (consent judgment is not an adjudication of the merits); *Welsh v Gerber Products, Inc*, 315 Md 510, 522; 555 A2d 486, 492 (1989); *Hentschel v Smith*, 278 Minn 86, 96; 153 NW2d 199, 206 (1967) ("A consent judgment "is not a judicial determination of the rights of the parties and does not purport to represent the judgment of the court, but merely records the pre-existing agreement of the parties."); *Matter of Hunter*, 17 BR 523, 526 (Bankr WD Mo, 1982); *Linder v Missoula Cty*, 251 Mont 292, 297; 824 P2d 1004, 1007 (1992) (consent judgments do not have preclusive effect unless that is the intent of the parties); *Strunk v Chromy-Strunk*, 270 Neb 917, 929; 708 NW2d 821, 833 (2006) ("In consent judgments, the court does not inquire into the merits or equities of the case, and the only questions to be determined are whether the parties are capable of binding themselves by consent and whether they have actually done so."); *Willerton v Bassham, by Welfare Div, State, Dep't of Human Res*, 111 Nev 10, 17 n 6; 889 P2d 823, 827 (1995) (consent judgments "do have res judicata (claim preclusion) effect, but do not have collateral estoppel (issue preclusion) effect."); *MA Crowley Trucking, Inc v Moyers*, 140 NH 190, 195; 665 A2d 1077, 1080 (1995); *Long v Mertz*, 21 NJ Super 401, 403; 91 A2d 341, 342 (App Div 1952) ("the only judgment entered in this case was a consent judgment. There was no testimony taken; there was no trial; there was no determination of the facts by the court. A consent judgment does not lie in adjudication, so much as in the agreement between the parties."); *Pope v Gap, Inc*, 1998-NMCA-103; 125 NM 376, 383; 961 P2d 1283, 1290 (1998) (consent judgments do not have preclusive effect); *Halyalkar v Bd of Regents of State of NY*, 72 NY2d 261, 269; 532 NYS2d 85, 90; 527 NE2d 1222, 1227 (1988); *In re Olson*, 170 BR 161, 167 (Bankr D ND, 1994) ("Logic dictates that because nothing is 'adjudicated' between parties to a consent judgment, the essential requirement of "actual litigation" necessary to issue preclusion cannot be satisfied since the very reason for entering into a consent judgment is to avoid litigation. Consent judgments do not involve a decision or contest on the merits. The fact that a tribunal has not actually resolved or settled the substance of the issues presented by the parties is indeed the essential characteristic of a consent judgment."); *Kirkpatrick v Chrysler Corp*, 1996 OK 136; 920 P2d 122, 133 (1996); *Gordon H Ball, Inc v Oregon Erecting Co*, 273 Or 179, 186; 539 P2d 1059, 1063 (1975); *GPU Indus Intervenors v Pennsylvania Pub Util Comm'n*, 156 Pa Cmwlth 626, 641; 628 A2d 1187, 1194 (1993); *Indem Ins Co v City of Garland*, 258 SW3d 262, 272 (Tex App 2008) (consent judgment does not support collateral estoppel unless intended by parties); *Meadows v Wal-Mart Stores, Inc*, 207 W Va 203, 222; 530 SE2d 676, 695 (1999).

B. THE CONSENT JUDGMENT WAS NOT A DETERMINATION THAT ACTS OF FRAUD OR DISHONESTY WERE COMMITTED BY THE INSURED.

For the reasons set forth above and in the Funds' Application and Reply, the Consent Judgment does not constitute a "determination" of any fact in issue in the Underlying Suit (including the nature of the insured's conduct). But even if we were to assume, for the sake of argument, that a consent judgment **could** constitute a factual determination—though it cannot—the Consent Judgment is still insufficient to trigger the Fraud Exclusion. As discussed at length in the Funds' Application and Reply, that is because the Consent Judgment was based on the Funds' CUSA claims, all of which were negligence-based and did not require any showing of scienter or dishonest intent. App. at pp. iii-iv, 13-14, 24-27 and Reply at pp. 8. The Funds rest on the briefing in their Application and Reply, both of which contain citations to a number of cases holding that fraud/dishonesty exclusions—like the Fraud Exclusion at issue here—do not apply to negligence-based claims. *Id.*

VI. CONCLUSION

Michigan law is clear and consistent with the overwhelming weight of authority from other jurisdictions. Consent judgments are not a determination of any fact in issue in a case. Moreover, even if a consent judgment could rise to the level of a factual determination—though it cannot—the Consent Judgment at issue here would still be insufficient to trigger the Fraud Exclusion. The type of fraudulent or dishonest intent that is necessary to trigger the Fraud Exclusion was not an element of the CUSA claims on which the Consent Judgment is based. Both of these defects demonstrate that the Court of Appeals' Opinion applying the Fraud Exclusion to bar coverage for the liability imposed by the Consent Judgment is erroneous. As such, the Funds respectfully request this Court peremptorily reverse the Opinion or, in the alternative, grant the Funds' Application for Leave to Appeal.

Respectfully submitted,

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Dated: August 12, 2016

STATE OF MICHIGAN

IN THE SUPREME COURT

EMPLOYERS MUTUAL CASUALTY COMPANY

Plaintiff/Counter-Defendant-Appellee,

v.

HELICON ASSOCIATES, INC., a Michigan corporation, ESTATE OF MICHAEL J. WITUCKI, in its capacity a successor in interest to Michael J. Witucki, a deceased individual,

Defendants/Counter-Plaintiffs,

and

DR. CHARLES DREW ACADEMY, a Michigan public school academy, JEREMY GILLIAM,

Defendants, and

WELLS FARGO ADVANTAGE NATIONAL TAX FREE FUND, a series of the Delaware business trust known as the Wells Fargo Funds Trust, Delaware Business Trust, WELLS FARGO ADVANTAGE MUNICIPAL BOND FUND (in part as successor to the Wells Fargo Advantage National Tax-Free Fund), a series of the Delaware business trust known as the Wells Fargo Funds Trust, a Delaware business trust, LORD, ABBETT MUNICIPAL INCOME FUND, INC., on behalf of its series Lord Abbett High Yield Municipal Bond Fund, a Maryland corporation, PIONEER MUNICIPAL HIGH INCOME ADVANTAGE, a Massachusetts business trust, by Pioneer Investment Management, Inc., its investment advisor,

Defendants-Appellants.
_____/

Supreme Court
No. 152994

Court of Appeals
No. 322215

Wayne County Circuit Court
Case No. 12-002767-CK

CERTIFICATE OF SERVICE

I hereby certify that on August 12, 2016, I electronically filed the foregoing **SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL**

BY DEFENDANT-APPELLANT with the Clerk of the Court using the TrueFiling system which sent notification of same to:

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EXHIBIT A

TO

SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL BY DEFENDANT-APPELLANT

(In re Fodale)

2012 WL 718904
Only the Westlaw citation is currently available.
United States Bankruptcy Court,
E.D. Michigan,
Southern Division.

In re Samuel Michael FODALE, Debtor.
Giannetti Contracting Corp., Plaintiff,
v.
Samuel Michael Fodale, Defendant.

Bankruptcy No. 10–69502.
|
Adversary No. 10–07510.
|
Feb. 23, 2012.

Attorneys and Law Firms

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Andrea D. Cartwright, Southfield, MI, for Defendant.

OPINION DENYING MOTION FOR SUMMARY JUDGMENT (Docket No. 26)

WALTER SHAPERO, United States Bankruptcy Judge.

***1** Before the Court is a motion for summary judgment in an action under 11 U.S.C. § 523(a)(2)(A), (a)(4), and (a)(11). For the reasoning that follows, the motion is denied.

Facts

This matter arises out of two construction projects in Michigan. Defendant Samuel Fodale ("Fodale") is or was, at all relevant times, an officer, member, manager and/or person in control of Fodale Group, LLC ("FG"). FG was the general contractor on two separate construction improvement projects—TDS-US Project in Warren, Michigan and the Metropolitan Parkway Warehouse Project in Sterling Heights, Michigan—on which Plaintiff Giannetti Contracting Corporation ("Giannetti") provided excavation and underground site work.

On March 20, 2006, Giannetti and FG entered into a contract whereby Giannetti agreed to provide the above stated services on a time and material basis for the TDS–US Project. It is undisputed that Giannetti completed the contract work and that the total amount owed to Giannetti on this project is $50,670.63. Further, there is no challenge to Giannetti's claim that it did not receive payment.

On October 13, 2006, Giannetti and FG entered into another contract in the amount of $883,200, which was later modified to $908,789, whereby Giannetti agreed to provide its services for the Metropolitan Parkway Warehouse Project. It is also undisputed that Giannetti completed the contract work and that FG owed it $908,789 for this second project. FG has paid $795,150 to Giannetti leaving a balance of $113,639 on the Metropolitan Parkway Warehouse Project. On June 8, 2007, Fodale presented Giannetti with a check in the amount of $113,639 in exchange for a full unconditional waiver of Giannetti's construction lien. The check, however, was dishonored for non-sufficient funds and Giannetti's waiver caused it to lose its secured interest as a construction lien claimant. The claimed amount owing to Giannetti for both of the projects is $164,309.63.

On May 8, 2008, Giannetti filed a lawsuit against Fodale and FG in the Macomb County Circuit Court (Case No.2008–2041–CK) concerning the TDS–US Project and alleging six counts against FG: (1) breach of contract/account stated, (2) unjust enrichment, (3) fraud, (4) misrepresentation, (5) violation of the Michigan Builder's Contract Fund Act, and (6) conversion; and four counts against Fodale: (1) fraud, (2) misrepresentation, (3) violation of the Michigan Builder's Contract Fund Act, and (4) conversion. On May 9, 2008, Giannetti filed a second lawsuit against Fodale and FG in the Macomb County Circuit Court (Case No.2008–2049–CK) concerning the Metropolitan Parkway Warehouse Project, alleging the same exact counts as it alleged in the first lawsuit.

Subsequently, the parties came to an agreement. On December 3, 2008, despite failing to execute any settlement documents, the parties appeared before the Honorable David F. Viviano of the Macomb County Circuit Court to place the terms of their agreement on the record. The relevant terms of the agreement are as follows: (1) Fodale or FG will pay $140,000 to Giannetti—the settlement

was for $150,000, but an initial payment of $10,000 was already paid; (2) the $140,000 will be paid in installment payments of $10,000 per month; (3) in the event of a default, past the seven-day cure period, the amount owed will increase to $164,000 less amounts paid; and (4) the parties have 21 days to execute the settlement documents and enter an order of dismissal of the two cases, Case Nos.2008–2041–CK and 2008–2049–CK. (Transcript of hearing on Dec. 3, 2008.) As noted, Fodale and FG, made an initial payment of $10,000, but thereafter failed to make the installment payments and refused to execute a written settlement agreement encompassing the settlement that was placed on the record.

***2** On March 9, 2009, Giannetti filed a motion to enforce the settlement agreement and to enter a judgment against Fodale and FG. On March 23, 2009, a hearing was held and the Macomb County Circuit Court entered an order granting Giannetti's motion to enforce the settlement agreement. The court entered a judgment against Defendants for $144,000.00, which "represents the accelerated amount of $164,000.00 owed to Giannetti pursuant to the Settlement Agreement, less $20,000.00 of payments made by Defendants pursuant to the Settlement Agreement."

Fodale filed his chapter 7 bankruptcy petition on September 23, 2010, and this adversary proceeding was timely filed on December 10, 2010. Giannetti brings this motion for a summary judgment denying the discharge of Fodale's $144,000 judgment debt to Giannetti, contending that Fodale's debt was reduced to a judgment and that both the debt and the judgment are based on allegations of fraud arising from Fodale's repeated false representations of payment and his inducement to have Giannetti sign a full and unconditional waiver in exchange for a check that was written upon insufficient funds. Consequently, Giannetti contends that collateral estoppel precludes this Court from itself determining those issues. Fodale argues that collateral estoppel does not preclude this Court from determining the issue of fraud or other substantive issues, because there was never any finding of fraud and the parties' settlement agreement expressly provides that there is no admission of liability or wrongdoing. Accordingly, the Court must determine whether collateral estoppel applies here.

Discussion

Federal Rule of Bankruptcy Procedure 7056 incorporates Federal Rule of Civil Procedure 56. Under Rule 56(a), summary judgment is proper if the moving party "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." As the Supreme Court has explained, "the plain language of Rule 56[ ] mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). In deciding a motion brought under Rule 56, the Court must view the evidence in a light most favorable to the nonmoving party. *Pack v. Damon Corp.,* 434 F.3d 810, 813 (6th Cir.2006). However, the nonmoving party may not rely on mere allegations or denials but must "cit[e] to particular parts of materials in the record" as establishing that one or more material facts are "genuinely disputed." Fed.R.Civ.P. 56(c)(1). "[T]he mere existence of a scintilla of evidence that supports the nonmoving party's claims is insufficient to defeat summary judgment." *Pack,* 434 F.3d at 814 (internal quotation marks and citation omitted).

***3** Here, the moving party is Giannetti, and the foundation for its motion is the Michigan state court judgment and the averred collateral estoppel effect arising therefrom. "Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Montana v. United States,* 440 U.S. 147, 153 (1979) (citations omitted). In *Livingston v. Transnation Title Insurance Co.* (*In re Livingston*), 372 Fed. Appx. 613, 617 (6th Cir.2010) (citations omitted), the Sixth Circuit Court of Appeals confirmed that principles of collateral estoppel apply in nondischargeability actions. *See also Grogan v. Garner,* 498 U.S. 279, 285 (1991) ("[C]ollateral estoppel principles do indeed apply in discharge exception proceedings pursuant to § 523(a)."). In *Livingston,* 372 Fed. Appx. at 617, the Sixth Circuit followed another bankruptcy court in this district in looking to Michigan law to determine whether a Michigan state court judgment has a preclusive effect. *See also Migra v. Warren City Sch. Dist. Bd. of Educ.,* 465 U.S. 75, 81 (1984) ("[A] federal court must

give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the [s]tate in which the judgment was rendered.")

Given the sequence of recited events in the state court leading to the hearing on March 23, 2009, the judgment in the present case is "in essence," and must be treated as the functional equivalent of, a consent judgment. *See generally Morrison v. Carmona* (*In re Carmona*), 424 B.R. 227, 232 (E.D.Mich.2010) (holding that a judgment entered pursuant to a case evaluation is "in essence" a consent judgment). It arose from a settlement agreement, some payments under which were made, and became embodied in a judgment rendered in the context of enforcing that settlement agreement and as a result of defaults thereunder. Under Michigan law, consent judgments are not generally given collateral estoppel effect. *Am. Mut. Liability Ins. Co. v. Mich. Mut. Liability Co.,* 235 N.W.2d 769, 776 (Mich.Ct.App.1975); *accord Kohlenberg v. Baumhaft* (*In re Baumhaft*), 271 B.R. 517, 521 (Bankr.E.D.Mich.2001) (J. Rhodes) (citations omitted). Because "a consent judgment reflects primarily the agreement of the parties[,]" by signing the judgment, the trial judge "merely put[s] his stamp of approval on the parties' agreement disposing of those matters." *Am. Mut. Liability Ins.,* 235 N.W.2d at 776. Thus, "the issues involved in the settled case [are] not actually adjudicated[.]" *Id.* Accordingly, consent judgments normally fail to meet the legal requirements of collateral estoppel. *Id.*

Persuasive policy reasons underlie that general rule. "The social interest in reducing instances of costly litigation is undermined by a rule which provides drastic consequences for settlements." *Id.* at 776–77. Parties are less willing to enter into settlement agreements if such agreements could have drastic, far reaching and unforeseeable consequences. *Id.* at 777. Further, by not recognizing a collateral estoppel effect, there is no threat to the legitimate expectations of repose, as parties to consent judgments do not bargain for such protection. *Id.* Moreover, judicial consistency is not disturbed since judges are not deciding issue underlying consent judgments. *Id.*

***4** The United States Supreme Court in *Archer v. Warner,* 538 U.S. 314, 322 (2003), also recognized that settlement agreements ordinarily are not given collateral estoppel effect. *Archer* dealt with a similar factual situation. There, the case arose out of circumstances of which the Supreme Court outlined:

> (1) *A* sues *B* seeking money that (*A* says) *B* obtained through fraud;
>
> (2) the parties settle the lawsuit and release related claims; (3) the settlement agreement does not resolve the issue of fraud, but provides that *B* will pay *A* a fixed sum; (4) *B* does not pay the fixed sum; (5) *B* enters bankruptcy; and (6) *A* claims that *B's* obligation to pay the fixed settlement sum is nondischargeable because, like the original debt, it is for "money ... obtained by ... fraud."

Archer, 538 U.S. at 316–17. While not deciding the collateral estoppel issue, the Supreme Court noted that "settlements ordinarily occasion no issue preclusion ... unless it is clear ... that the parties intend their agreement to have such an effect." *Id.* at 322 (quoting *Arizona v. California,* 530 U.S. 392, 414 (2000)).

There is an exception to the general rule of not giving consent judgments a collateral estoppel effect, however, and that is where "the parties have entered an agreement manifesting an intention that the judgment be conclusive with respect to one or more of the issues." *Baumhaft,* 271 B.R. at 521 (internal quotation and citations omitted). An exception to the rule came to light in the case of *Baumhaft.* There, another bankruptcy court in this district also needed to discern whether a consent judgment deriving from a Michigan state court could have a collateral estoppel effect in nondischargeability proceedings. *Id.* at 522–23. In that circumstance, the state court entered a consent judgment based upon a settlement agreement, which in turn incorporated a stipulation of facts. *Id.* at 522–23. The combination thereof manifested an intention of the parties to be bound by the stipulated facts, and those agreed-upon facts necessarily satisfied the nondischargeability elements at-issue. *Id.* Accordingly, the court recognized a collateral estoppel effect arising from the limited circumstance of that particular consent judgment.

So, unlike in *Baumhalf,* the judgment incorporating the agreement here neither provides an intention of the parties that the judgment be conclusive to nondischargeability issues, nor does it begin to resolve any issues of fact upon which this Court can rely. To the contrary, the settlement agreement presented here strictly expresses the

terms of payment, orders the parties to execute settlement documents, and provides the consequences of default. Neither the settlement agreement nor the order of default discuss the substantive issues before the Court, including those relating to fraud.[1] Based on these circumstances, the exception to the general rule does not apply.

Conclusion

***5** For the foregoing reasons, Giannetti's motion for summary judgment is denied. The Court is concurrently entering an order to that effect.

All Citations

Not Reported in B.R., 2012 WL 718904

Footnotes

1 Fodale, in addition, argues that the parties' settlement agreement contains two provisions, which expressly provide that there is no admission of liability or wrongdoing. The Court does not base its conclusion thereon, as Fodale failed to provide the Court with the whole agreement. If, however, the agreement contains such provisions, they would only reinforce the Court's conclusion that collateral estoppel does not apply.

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